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## The Tenth Circuit's Approach to the Constitutionality of the Federal Sentencing Guidelines

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# THE TENTH CIRCUIT'S APPROACH TO THE CONSTITUTIONALITY OF THE FEDERAL SENTENCING GUIDELINES

## I. INTRODUCTION

No person shall "be deprived of life, liberty, or property, without due process of law."<sup>1</sup> This simple-sounding command and the notion of protection of liberty interests have been the focus of much controversy since congressional enactment of the Sentencing Reform Act of 1984 (Act).<sup>2</sup> The Act created the United States Sentencing Commission (Commission) charged with establishing sentencing guidelines<sup>3</sup> for federal judges to rely on when sentencing convicted offenders. The intent of the guidelines was to promote uniformity in sentencing in the face of what had been described as "shameful disparity" in sentences which were granted to similarly situated individuals;<sup>4</sup> however, individual discretion which had traditionally resided with the sentencing judge was eroded by the application of these guidelines.<sup>5</sup> The guidelines went into effect on November 1, 1987.<sup>6</sup>

On January 18, 1989, the Supreme Court decided *Mistretta v. United States*<sup>7</sup> which ruled that the sentencing guidelines were constitutional in that they amounted to neither excessive delegation of legislative power nor violation of the separation of powers principle. The Court did not address, among other possible issues, the wisdom of fixed prison sentences. The guidelines have been accused of being a mechanical sentencing system which fails to be a satisfactory substitute for an experienced trial judge who can consider both compassion and skepticism when passing sentence.<sup>8</sup> Since the *Mistretta* decision, the lower courts have been plagued with challenges to the guidelines on different constitutional grounds.

The Tenth Circuit has not been immune in the past year from challenges to these guidelines. Several cases argued before the court have

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1. U.S. CONST. amend. V.

2. 18 U.S.C. §§ 3551-3673 (Supp. III 1985); 28 U.S.C. §§ 991-98 (Supp. III 1985).

3. 28 U.S.C. § 994(a)(1).

4. S. REP. NO. 225, 98th Cong., 1st Sess. 65, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS 3182 [hereinafter S. REP. NO. 225]; see 28 U.S.C. § 991(b)(1)(B) (1982 & Supp. III 1985).

5. See *Recent Developments*, 42 ARK. L. REV. 1117 (1989).

6. The Act states:

The court shall impose a sentence of the kind, and within the range referred to in subsection (a)(4), unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described. 18 U.S.C. § 3553(b) (Supp. IV 1986).

7. 109 S. Ct. 647 (1989).

8. L.A. Times, Feb. 12, 1989, § 5 (Opinion), at 4, col. 1.

charged that the guidelines were improperly applied to the facts.<sup>9</sup> The cases of most interest after *Mistretta* are based on constitutional due process challenges to the guidelines. The issue was raised several times before the Tenth Circuit but was disposed of without a ruling.<sup>10</sup> Finally, in *United States v. Thomas*,<sup>11</sup> the court rejected a due process challenge to the guidelines.

Following a brief discussion of the history of the guidelines, this article examines the Tenth Circuit's holdings regarding the constitutionality of the federal sentencing guidelines and the future implications of these holdings on subsequent constitutional challenges to this determinate sentencing structure.

## II. BACKGROUND

### A. *The Federal Sentencing Guidelines*

Prior to the changes that occurred through implementation of these guidelines, sentencing in federal criminal cases was based on an indeterminate sentencing system. Under this past system, judges, while guided by statutes specifying penalty ranges for individual crimes, had much discretion to decide how severely or leniently to apply the statutory penalty.<sup>12</sup> Parole was used as a supplement to this system, whereby an offender was "returned to society under the 'guidance and control' of a parole officer."<sup>13</sup>

The basis of sentencing under the old system was to foster and potentiate the rehabilitation of the offender. The rationale underlying this rehabilitative model was to minimize the risk to society that the offender would resume criminal activity once he had completed his sentence.<sup>14</sup> In the 1970's, in the face of growing skepticism over the rehabilitative purpose, discretionary sentencing structures became the target of much criticism.<sup>15</sup> Congress became aware that the rehabilitation model had become "outmoded" and that the goal of rehabilitating offenders was not being reached.<sup>16</sup> The two negative consequences of the indeterminate sentencing system noted in the Senate Report were that there was disparity in sentences imposed on similarly situated individuals and that, consequently, uncertainty existed as to the time an offender would spend in prison.<sup>17</sup> As a result, in 1984, while public concern was mounting about the increase in drug-related and violent

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9. See *United States v. Roberts*, 898 F.2d 1465 (10th Cir. 1990); *United States v. Beaulieu*, 893 F.2d 1177 (10th Cir. 1990); *United States v. Smith*, 888 F.2d 720 (10th Cir. 1989); *United States v. Shorteeth*, 887 F.2d 253 (10th Cir. 1989).

10. See *Lewis v. Martin*, 880 F.2d 288 (10th Cir. 1989); *United States v. Goldbaum*, 879 F.2d 811 (10th Cir. 1989).

11. 884 F.2d 540 (10th Cir. 1989).

12. *Mistretta v. United States*, 109 S. Ct. 647, 650 (1989).

13. *Id.* (citation omitted).

14. *Id.* See also A. VON HIRSCH, K. KNAPP & M. TONRY, *THE SENTENCING COMMISSION AND ITS GUIDELINES* 3-4 (1987)[hereinafter HIRSCH].

15. HIRSCH, *supra* note 14, at 3.

16. S. REP. NO. 225, *supra* note 4, at 38.

17. *Id.*

crimes, Congress enacted the Comprehensive Crime Control Act of 1984<sup>18</sup> which contained the Sentencing Reform Act of 1984.

The Sentencing Reform Act of 1984 established the United States Sentencing Commission to draft guidelines to standardize sentences imposed by federal courts upon similarly situated individuals for comparable criminal conduct.<sup>19</sup> The Commission was established "as an independent commission in the judicial branch of the United States."<sup>20</sup> Congress mandated that the Commission be comprised of seven voting members and one non-voting member. The members are appointed through Senate approval of Presidential nominations.<sup>21</sup> One of the requirements for composition of the Commission is that three members must be federal judges and no more than four members are permitted to be from the same political party.<sup>22</sup>

The Commission was charged with promulgating determinative sentence guidelines and periodically reviewing and revising the guidelines.<sup>23</sup> Furthermore, it was required that the Commission must, at least annually, submit to Congress an analysis of the operation of the guidelines.<sup>24</sup>

Practically, the guidelines are based on a grid system. A sentencing range is given based on the "offense level," which is calculated by adjusting the "base level" of a particular criminal offense through application of some offense and offender characteristics.<sup>25</sup> The base level is the assigned value associated with a particular offense before any adjustments are made. The mitigating and aggravating factors to be considered in adjusting the base level have been surrounded by controversy. The guidelines have been accused of failing to adequately consider important offender characteristics "such as age, prior drug history, and extent of the individual offender's blameworthiness for the specific crime for which he is being sentenced."<sup>26</sup>

The Commission had been encouraged by Congress to explore the "relevancy to the purposes of sentencing of all kinds of factors, whether they are obviously pertinent or not; to subject those factors to intelligent and dispassionate professional analysis; and on this basis to recommend,

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18. Pub. L. No. 98-473, 98 Stat. 1837 (1984), reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS (98 Stat.) 2. This act was a bipartisan congressional effort to change and recodify the federal criminal code. Changes made by this law included: (1) changes in the areas of sentencing, bail reform, drug trafficking, computer fraud, and criminal forfeiture; (2) establishment of a fund for compensation of victims of violent crimes; (3) revision of the insanity defense; (4) substantive changes to some of the federal statutes that dealt with the commission of violent or nonviolent serious offenses; and (5) some amendments to criminal code procedures to facilitate smoother operation of the federal criminal justice system. See also S. REP. NO. 225, *supra* note 4.

19. See 28 U.S.C. § 991(b)(1)(B) (Supp. III 1985).

20. *Id.* § 991(a).

21. *Id.*

22. *Id.*

23. *Id.* § 994(o).

24. *Id.* § 994(w).

25. Ogletree, *The Death of Discretion? Reflections on the Federal Sentencing Guidelines*, 101 HARV. L. REV. 1938, 1949 (1988).

26. *Id.* at 1951.

with supporting reasons, the fairest and most effective guidelines it can devise."<sup>27</sup> Yet, the Commission determined only three general categories of factors to be relevant: (1) the defendant's criminal history; (2) the defendant's dependence upon criminal activity for livelihood; and (3) the defendant's acceptance of responsibility for the wrongdoing.<sup>28</sup>

While the rigidity of the sentencing guidelines has resulted in recent challenges in the Tenth Circuit, a preliminary challenge — whether the Commission itself was constitutional — was decided in 1989 by the United States Supreme Court.

## B. *Mistretta v. United States*

### 1. Facts

Mistretta, under indictment for three counts arising from a cocaine sale, challenged the constitutionality of the Commission's guidelines on the grounds that the Commission was formed in violation of the separation of powers doctrine, and that Congress had delegated excessive authority to the Commission to structure the guidelines.<sup>29</sup> The United States Supreme Court granted certiorari in the face of varying holdings on this same issue by different circuit courts. In fact, certiorari was granted while an appeal was still pending on the case in the Eighth Circuit Court of Appeals.<sup>30</sup> On both issues the Court rejected the constitutional challenges, holding that Congress did not delegate excessive legislative power to the Commission and did not violate the separation of powers doctrine by placing the Commission in the Judicial Branch.

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27. See S. REP. NO. 225, 98th Cong., 2d Sess. 175, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS 3220, 3358.

28. Ogletree, *supra* note 25, at 1953. Other factors which Congress recommended be considered relevant to the sentencing procedure include age, education, mental and emotional condition, criminal history, dependence upon criminal activity for a livelihood, and community ties.

All of these factors are not considered. Specifically, Chapters Three and Four of UNITED STATES SENTENCING COMMISSION, *Guidelines Manual* (1989), in several parts, list the adjustments to be considered in altering the offense level.

There are victim-related adjustments (§ 3A). These include victim characteristics such as whether the victim was vulnerable or was an official. Also included is a consideration of whether the victim was restrained.

There are adjustments to be made depending on the offender's role in the offense. To be considered under this Part (§ 3B) is whether the offender played an aggravating role, a mitigating role or if he abused a position of trust or special skill.

Under Part C (§ 3C) is a consideration of whether the offender willfully obstructed or impeded proceedings during the investigation or prosecution of the offense.

Part D of Chapter Three guides the sentencing judge in adjustments to be made when there are multiple counts of conviction against the offender.

The final Part of Chapter Three (§ 3E) authorizes the sentencing judge to adjust the offense level based on the offender's acceptance of responsibility for his/her criminal conduct.

Chapter Four allows for adjustments to the base level sentence based on the offender's criminal history and reliance on criminal activities for livelihood.

29. *Mistretta*, 109 S. Ct. at 653.

30. *Id.* at 654.

## 2. Holdings

### a. *Excessive Delegation of Legislative Power*

The Court found excessive authority was not delegated because Congress had provided the Commission with an "intelligible principle" to use in establishing the guidelines.<sup>31</sup> This intelligible principle is a specific delineation of the bounds of discretion, by the delegating party (Congress), within which the body exercising delegated power must act.<sup>32</sup> The boundaries placed upon the Commission by Congress (relied upon by the Court) included congressional specifications of the goals of the Commission,<sup>33</sup> the "'purposes' of sentencing that the Commission must pursue in carrying out its mandate"<sup>34</sup> and the specific tool for the Commission to use in promoting its prescribed goals — the guidelines system.<sup>35</sup> In finding that the criteria which Congress supplied the Commission were adequate to reject a challenge based on excessive delegation of legislative authority, the Court discussed the fact that Congress also provided the Commission with criteria on how the Commission should promulgate the guidelines.<sup>36</sup>

### b. *Separation of Powers*

Despite the importance of the principle that each of the three branches of government must remain free of the control of the other branches, the Court recognized that there is no requirement that the branches must be completely distinct and separate.<sup>37</sup> Further, the Court reasoned, except in the cases of "most compelling constitutional reasons," a congressional act that has become law and that addresses a "deeply vexing national problem" will not be invalidated.<sup>38</sup>

A further argument was advanced that, because the Act requires there be a Presidential appointment of federal judges to serve on the Commission, the Act undermines the integrity of the Judicial Branch.<sup>39</sup> The Court recognized, however, that Congress has the authority to authorize a federal judge, in an individual capacity, to perform an execu-

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31. *Id.*

32. *Id.* at 654-58.

33. The Court quoted 28 U.S.C. § 991(b)(1), *supra* note 2: "[T]o 'assure the meeting of the purposes of sentencing as set forth' in the Act; to 'provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records . . . while maintaining sufficient flexibility to permit individualized sentences,' where appropriate; and to 'reflect to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process.'" *Id.* at 655-56.

34. "'[T]o reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense'; 'to afford adequate deterrence to criminal conduct'; 'to protect the public from further crimes of the defendant'; and 'to provide the defendant with needed . . . correctional treatment.'" *Id.* at 655-56 (quoting 18 U.S.C. § 3553(a)(2), *supra* note 2).

35. *Mistretta*, 109 S. Ct. at 656.

36. *Id.* at 656-58.

37. *Id.* at 659.

38. *Id.* at 661.

39. *Id.* at 667.

tive function without violating the separation of powers doctrine.<sup>40</sup> The judges' roles on the Commission, reasoned the Court, are that of commissioners or administrators, separate and distinct from their judicial roles.<sup>41</sup>

A due process challenge was not raised in *Mistretta*. After *Mistretta* was decided, a challenge to the guidelines, based on a violation of the separation of powers doctrine and an unconstitutional delegation of legislative authority, was brought before the Tenth Circuit.<sup>42</sup> These arguments were, naturally, quickly rejected based on the *Mistretta* precedent.

### III. TENTH CIRCUIT OPINIONS

#### A. *United States v. Thomas*

##### 1. Facts

Thomas was found guilty by jury verdict of possession with intent to distribute marijuana. After the verdict, but prior to sentencing, he filed a motion to have the sentencing guidelines declared unconstitutional. The trial judge implicitly denied this motion by sentencing Thomas under the guidelines; however, the judge did assign an alternative sentence in case the guidelines were found to be unconstitutional on appeal.<sup>43</sup>

Thomas charged that the guidelines violated his due process right to have a judge make a discretionary individualized determination of an appropriate sentence, that the guidelines deprived him of "meaningful participation" in the sentencing process by limiting his ability to present evidence relevant to sentencing, and, finally, that the guidelines unlawfully allowed the prosecutor and the Commission, rather than the sentencing judge, to determine his sentence.<sup>44</sup> The court rejected all of Thomas' due process arguments, joining the other circuit courts<sup>45</sup> in refusing to find a due process violation.<sup>46</sup> Since *Thomas*, the Tenth Circuit has not readdressed the due process issue in the context of the federal sentencing guidelines.<sup>47</sup>

##### 2. Substantive Due Process

###### a. *Holding*

The first holding of *Thomas* was that there exists no federal substan-

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40. *Id.* at 671.

41. *Id.*

42. *United States v. Goldbaum*, 879 F.2d 811, 812 (10th Cir. 1989).

43. *United States v. Thomas*, 884 F.2d 540, 541 (10th Cir. 1989).

44. *Id.*

45. *See United States v. Bolding*, 876 F.2d 21 (4th Cir. 1989); *United States v. Pinto*, 875 F.2d 143 (7th Cir. 1989); *United States v. Allen*, 873 F.2d 963 (6th Cir. 1989); *United States v. Seluk*, 873 F.2d 15 (1st Cir. 1989); *United States v. Brittman*, 872 F.2d 827 (8th Cir. 1989); *United States v. Vizcaino*, 870 F.2d 52 (2d Cir. 1989); *United States v. White*, 869 F.2d 822 (5th Cir. 1989) (per curiam), *cert. denied*, 109 S. Ct. 3172 (1989); *United States v. Frank*, 864 F.2d 992 (3d Cir. 1988), *cert. denied*, 109 S. Ct. 2442 (1989).

46. *Thomas*, 884 F.2d at 542.

47. *See United States v. Rutter*, 897 F.2d 1558 (10th Cir. 1990).

tive liberty interest in an individualized determination of an appropriate sentence. The court found that the recognition of an inherent human right to individualized treatment in sentencing would be

inconsistent with the generally accepted notion that both retribution, which focuses on the interests of the victim rather than the status of the defendant, and general deterrence, which focuses on the interests of society at large rather than the status of the defendant, are appropriate societal versions for imposing sanctions.<sup>48</sup>

In finding the nonexistence of a constitutional right to judicial discretion in individualized sentencing, the Tenth Circuit cited the Second Circuit. The Second Circuit had articulated that, if such a right existed, it would surely be recognized by now, given the varying mandatory minimum sentencing practices the federal government and the states have used in our nation's history.<sup>49</sup> In further support of the nonexistence of a constitutional substantive due process right to individual determination in sentencing, the court relied on the reasoning in *Mistretta*. It reasoned that, since *Mistretta* upheld Congress' power to divest the courts of their sentencing discretion and establish exact, mandatory sentences for all federal offenses, that Congress may also constitutionally circumscribe the discretion of the court in sentencing through the imposition of these guidelines.<sup>50</sup>

Even though the court found that no right to individualized treatment in sentencing exists, the court stated that the guidelines do allow for some discretion by the sentencing court:

Under the Guidelines, sentencing judges retain discretion to accept or reject a plea bargain, to resolve factual disputes about the appropriate base offense level, to consider adjusting that base level for mitigating and aggravating circumstances, to choose from a range of sentences, to set probation conditions, and to determine when to depart from the Guidelines.<sup>51</sup>

#### b. *Analysis*

At its inception, the Act identified the basic purposes of sentencing as retribution, deterrence, incapacitation, and rehabilitation.<sup>52</sup> Yet, Congress, in its hearings, acknowledged that rehabilitation alone, the previously unsuccessful underlying sentencing theory, was not "an appropriate basis for sentencing decisions."<sup>53</sup>

Sentencing could arguably fulfill its purposes of retribution, deterrence, incapacitation, and rehabilitation without denying a defendant the right to individualized sentence determination. The victim's and society's interests could be brought more to bear upon the sentence if the

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48. *Thomas*, 884 F.2d at 542-43 (citation omitted).

49. *United States v. Vizcaino*, 870 F.2d 52, 56 (2d Cir. 1989).

50. *Thomas*, 884 F.2d at 543.

51. *Id.* (quoting *United States v. Brittan*, 872 F.2d 827, 828 (8th Cir. 1989)).

52. 18 U.S.C. § 3553(a)(2) (Supp. III 1985).

53. S. REP. NO. 225, *supra* note 4, at 40 n.16.

judge were allowed greater latitude in determining an appropriate sentence through consideration of the defendant's character, the victim's losses, and the risk posed to society by that particular individual.

The court's reliance on the argument that if a right to individual sentencing existed, it would have been articulated by now in the face of a history of variety in mandatory minimum sentencing schemes is not surprising given the reluctance of the judiciary to expand the realm of fundamental rights. Sentencing schemes with only mandatory minimum sentencing requirements vary, and, assuredly, some provide for much more discretion than others. Discretionary sentencing practices were prominent until the 1970's when rehabilitation was considered to be a primary goal.<sup>54</sup> American statutes typically set only maximum penalties for each crime, and the judge had the choice of any sentence within the limit: a fine, probation, jail sentence or a shorter or longer term in state prison.<sup>55</sup> Judicial discretion under these sentencing patterns did vary, but was greater than the discretion now sanctioned under the federal guidelines. The judge could usually impose any maximum or minimum sentence within the statutorily defined limits.<sup>56</sup> It is possible that the only reason that a right to individualized sentencing was not brought to light previously is because, under indeterminate sentencing structures, sentences were much more, albeit not totally nor consistently, individualized. It is interesting to note that, although the court failed to find a federal substantive liberty interest in an individualized determination of an appropriate sentence, the court did discuss the fact that the guidelines allow for some judicial discretion.<sup>57</sup> Thus, a close reading of this case uncovers an underlying tension. If no entitlement to individualized sentencing exists, the court need not defend the guidelines on the ground that they allow for some individualization.

### 3. Procedural Due Process

Thomas' procedural due process arguments charged that the guidelines deprived him of meaningful participation in the sentencing process because they limited the factors relevant to sentencing. He claimed his liberty interest was violated as a result of this procedure. The court had little trouble rejecting this argument, finding it to be substantially the same as the individualized sentencing substantive due process argument.<sup>58</sup>

#### B. *United States v. Roberts*

##### 1. Facts

Recently, the Tenth Circuit rejected another constitutional attack

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54. J. MILLER, M. ROBERTS & C. CARTER, *SENTENCING REFORM: A REVIEW AND ANNOTATED BIBLIOGRAPHY* 1 (1981).

55. HIRSCH, *supra* note 14, at 3.

56. *Id.* at 3-6.

57. *See supra* note 51 and accompanying text.

58. *Thomas*, 884 F.2d at 544.

on the guidelines. A vagueness challenge to the term "more serious offense" was raised in *United States v. Roberts*<sup>59</sup> by the defendant, Roberts, who was sentenced under a provision using this term. Roberts pled guilty to a charge alleging one count of assault with intent to commit a felony within the special maritime and territorial jurisdiction of the United States.<sup>60</sup>

Under the challenged provision, a defendant convicted pursuant to a guilty plea "containing a stipulation that specifically establishes a more serious offense than the offense of the conviction," must be sentenced under the standards for the more serious offense.<sup>61</sup> A stipulation existed in Roberts' plea agreement concerning the circumstances of the offense. It established that the defendant's acts constituted the more serious crime of robbery even though his plea bargain resulted in a conviction for a less serious offense of assault with intent to commit a felony.<sup>62</sup>

## 2. Holding

The Tenth Circuit rejected Roberts' vagueness argument, holding that the guidelines adequately define what constitutes a more serious offense.<sup>63</sup> Due process, therefore, is not offended by utilization of this term because the guidelines' assignment of numeric values to a base offense and possible adjustments set explicit standards, preventing arbitrary or discriminatory interpretation of a "more serious offense."<sup>64</sup>

## 3. Analysis

The vagueness argument raised by Roberts was a futile attempt in light of the sophisticated grid system of sentence determination enacted precisely to eliminate ambiguities and govern with certainty the sentencing determination.

Not addressed by the court in *Roberts* and relevant to the application of the sentencing guidelines in the presence of a plea bargain, was the issue of who actually decides the sentence. It has been argued that the sentencing discretion in this instance shifts from the judge to the prosecutor.<sup>65</sup> This issue has been a major source of contention since the implementation of the guidelines.<sup>66</sup> The basis of the argument is that not every defendant, although a majority, has access to plea bargaining.

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59. 898 F.2d 1465, 1467 (10th Cir. 1990).

60. *Id.* at 1466.

61. UNITED STATES SENTENCING COMM'N, *Guidelines Manual*, § 1B1.2(a) (1989).

62. *Roberts*, 898 F.2d at 1469.

63. *Id.* at 1467-68.

64. *Id.* at 1467.

65. Comment, *Structuring Determinate Sentencing Guidelines: Difficult Choices for the New Federal Sentencing Commission*, 35 CATH. U.L. REV. 181 (1985).

66. A detailed analysis of this problem, in light of the many in-depth articles and books on the topic, is outside the scope of this article. For further information, see Hirsch, *supra* note 14, at 142-76; J. MILLER, M. ROBERTS, C. CARTER, *SENTENCING REFORM: A REVIEW AND ANNOTATED BIBLIOGRAPHY 1* (1981). Both contain excellent bibliographies of additional sources on this topic.

The decision for this is left in the prosecutor's hands, not the judge's. This theory is based on the presumption that a prosecutor, through charging and negotiating a plea will determine the disposition of the sentence, thereby undermining the sentencing guidelines.<sup>67</sup> Is it right that the sentencing reforms should, in an effort to decrease sentencing disparity, remove judicial discretion and place it instead in the hands of members of the executive branch? Congress was concerned with this problem and directed the Commission to issue policy statements to guide judges in deciding the acceptability of plea bargaining agreements.<sup>68</sup> This is an issue not yet before the courts, but one which the Commission, under a directive from Congress, should be evaluating.<sup>69</sup>

#### IV. IMPLICATIONS

The holding of *Mistretta* answers separation of powers concerns; however, it does not solve other constitutional problems surrounding the use of sentencing guidelines.

The argument that no fundamental right to individualized sentencing exists because it has not existed historically in the presence of minimum sentencing requirements seems to beg the question. In light of changed circumstances, the courts should more fully evaluate whether constitutional protection of liberty interests should be expanded to include a constitutional right to individual sentencing.<sup>70</sup>

Procedural due process guarantees defendants the right to a fair hearing. Whether it also guarantees an individual a right to a fair hearing on sentencing, after a fair hearing on conviction, is a question to consider. Instructing judges how to weigh the circumstances of their cases turns a sentencing hearing into a mere formality, where individual attributes (except those provided for in the guidelines) can neither hinder nor aid an individual's case.

The holding in *Thomas*, and other circuit court holdings which approve the guidelines, will not promote reform. Rather, the issue will be further obscured as later courts use these holdings as precedent.

It has been suggested that the sentencing guidelines should be amended so that an individual's motivation for committing an offense is considered in the sentencing decision.<sup>71</sup> This suggestion could be taken a step further so that all of the factors originally suggested to the Commission by Congress would be given consideration in the formation of the sentencing guidelines.<sup>72</sup> This model has been termed the guided

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67. See Comment, *supra* note 65, at 200.

68. S. REP. NO. 225, *supra* note 4, at 63.

69. See *supra* note 24 and accompanying text.

70. For example, the right of privacy, a liberty interest, was expanded in 1973 to include the right of a woman to choose abortion in the face of changed public sentiment and changed technology. *Roe v. Wade*, 410 U.S. 113 (1973).

71. See *Legal Times*, Aug. 28, 1989, at 21, col. 1 (comment by Judy Clarke, Federal Defender).

72. See *supra* note 27 and accompanying text.

discretion model.<sup>73</sup> Until the time that new reforms are implemented, the duty of the judiciary is to focus the Commission on the practical effects of these guidelines. Trial judges should write sentencing opinions in cases where the guidelines present problems. Ideally, these opinions would include the process used to determine the sentence, the exercise of discretion within the guidelines and the basis of that exercise, and the reasons for any departure from the guidelines.<sup>74</sup> Then, in the face of these opinions and through a reevaluation process, the Sentencing Commission would have a framework upon which to institute needed reform.

#### V. CONCLUSION

Fairness in sentencing is the concern of the judiciary. When Congress empowered the United States Sentencing Commission to establish federal sentencing guidelines, it also had fairness in mind. Unfortunately, the guidelines have overcured the problem. Now, two defendants whose conduct is the same but whose character and potential for rehabilitation appear to be greatly different are subject to identical sentences. By declaring the guidelines constitutional, the Tenth Circuit, along with other circuits, has foregone the opportunity to modify the guidelines. This, however, need not end the discussion. Findings of constitutionality do not mean that the goal of consistent, yet fair, sentencing has been achieved. The creation of the Commission, and therefore the guidelines, was a legislative action. Through the political process, if not the judicial process, necessary reform can and should be achieved.

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73. As a guide for instigation of this revised model, Ogletree, *supra* note 25, at 1956-57, suggested that the Commission examine the Supreme Court's death penalty jurisprudence. In the death penalty area more than any other, the Court struggled with procedural and due process issues in criminal sentencing. Even though the nature of the sanction differs, the Court's efforts to achieve equity in that area are relevant to the goal of achieving equity in other sentencing areas.

74. *Legal Times*, *supra* note 72, col. 3 (comment of Judge Robert Sweet, U.S. Dist. Ct. for Southern Dist. of N.Y.).

